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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CENTURY 21 BUTLER REALTY, INC.,

Plaintiffs and Appellants,

v.

DIANE M. DENNELL, et al,

Defendants and Respondents.

2d Civil No. B218720
(Super. Ct. No. 1269459)
(Santa Barbara County)

Appellant Century 21 Butler Realty, Inc. (Century 21) filed an action against the estate of deceased business owner, Steven Dennell, seeking a commission for the sale of a convenience store pursuant to an exclusive listing agreement. The trial court found that Century 21 failed to produce a buyer prior to the expiration of the listing agreement, thus was not entitled to a commission. We affirm.

FACTS

Listing Agreement

Steven Dennell co-owned the R Country Market in Santa Ynez (the Santa Ynez store) with Ed Hamer. Dennell leased the premises of the Santa Ynez store from Michele Hinnrichs, and he was the sole signatory on the lease. In January 2007, Dennell and Hamer listed the Santa Ynez store with Century 21 for \$250,000 plus inventory. They executed an exclusive six-month business listing agreement which provided that

Century 21 was a dual agent for the buyer and seller, and it would receive a commission of eight percent of the sales price under any of the following circumstances: (1) it produced a buyer during the listing period who offered to acquire the business on price and terms acceptable to the owner; (2) the owner sold the business to a buyer in violation of the terms of the listing agreement; or (3) the property was withdrawn from the market, without the broker's written consent. The listing agreement was to expire on July 1, 2007. It was executed by Steve Dennell and Ed Hamer doing business as Santa Ynez Country Store, LLC. Dennell and Hamer signed individually. Robert Joyce was the agent for Century 21, and signed the agreement on its behalf.

Business Purchase Agreement

Century 21 found a prospective buyer, Nadim Maida. In January 2007, Maida offered to purchase the Santa Ynez store for \$150,000 plus inventory. He made his offer contingent upon his ability to obtain a 10-year lease from Hinnrichs, with a 5-year option to renew. Joyce, the agent for Century 21, prepared a Business Purchase Agreement (BPA) specifying that Maida's obligation to purchase was dependent upon his ability to secure a new lease. A 45-day escrow was opened for the Santa Ynez store on January 30, 2007. Maida testified at trial that escrow was extended several times until June 15.

Unavailability of New Lease

Dennell's existing lease on the Santa Ynez store was due to expire on October 30, 2009, and had a five-year option to renew, subject to the landlord's consent. Because only two years remained on the existing lease, Maida wished to obtain a ten-year lease, with a five-year option to renew. Joyce communicated Maida's request to Hinnrichs, who indicated by email that she would consider assigning the existing lease to Maida, provided he met certain conditions, and his credit "check[ed] out."

Several weeks later, Hinnrichs learned that Maida intended to sell hard liquor at the Santa Ynez store. On May 7, 2007, Hinnrichs emailed Joyce and told him she had decided not to enter into "any" lease with Maida. She would consent to

assignment of the existing lease, provided certain monies were paid that were due under the lease. Hinnrichs refused to approve a hard liquor license, which she considered inappropriate for the property. Dennell died unexpectedly on May 27, 2007, before the listing agreement expired on July 1. After his death, Diane Dennell was appointed administrator of his estate. Century 21 filed a creditor's claim for \$60,000, representing its alleged commission. Diane Dennell rejected the claim.

Cancellation of Escrow

In August 2007, after the listing agreement had expired, counsel for Maida sent a letter to Hinnrich's counsel, indicating Maida would like to proceed with the transaction "as agreed." This included assuming the existing lease. The letter listed pending matters to be resolved between Maida, Hinnrichs, Dennell's estate and Ed Hamer before escrow could close.

An attorney was retained to represent the estate. In October 2007, counsel for the estate and Ed Hamer indicated to Century 21 that the deadline to close escrow had expired. The estate's counsel instructed the title company to cancel escrow, and, later that month, both Hamer and Maida executed cancellation instructions.

In November 2007, Century 21's counsel sent a letter to counsel for the estate, indicating that Maida wished to proceed with the purchase of the Santa Ynez store. Century 21's counsel stated that, although the parties were free to execute cancellation instructions and remove the property from the market, Century 21 was still entitled to receive its commission because it had provided a ready, willing and able buyer, pursuant to the terms of the listing agreement.

Proceedings in Trial Court

On May 22, 2008, Century 21 filed this action against Dennell's estate and Ed Hamer. In its second amended complaint, Century 21 alleged a cause of action for breach of the real estate listing and commission agreement. It also alleged causes of action for unfair competition in violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.), and discrimination based on ancestry in violation of the Unruh Civil

Rights Act (Civ. Code, §§ 51, 51.5). The latter two claims were asserted against the estate, Ed Hamer, and real estate broker Mike Brady.¹

Century 21 argued that it had produced a ready, willing and able buyer, and the sale was not completed due to allegedly improper conduct by Ed Hamer and Diane Dennell while settling the estate. Respondents countered that the sale of the Santa Ynez store was never consummated because Maida was unable to obtain a lease.

Judgment was entered (*nunc pro tunc*) on August 10, 2009, against Century 21 and in favor of all defendants. Century 21 requested a statement of decision, which the trial court issued on August 14. It found that neither Dennell nor Hamer hampered Maida's negotiations with the landlord, Hinnrichs. The court stated that Maida had imposed a condition in his offer that he obtain a new 10-year lease, with a 5-year option to renew. His inability to satisfy the condition, or remove it from the contract, caused the transaction to fail.

DISCUSSION

Alleged Breach of Listing Agreement

We review the trial court's findings of fact to determine whether they are supported by substantial evidence. (*In re Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.) Its conclusions of law are subject to our independent review. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 936.)

Maida conditioned his offer upon obtaining a long-term lease from Dennell's landlord. That did not occur. The BPA specified that any removal of contingencies must be in writing. Maida was authorized to remove the lease contingency, but failed to do so. Century 21 argues that its right to a commission was not contingent upon Maida obtaining a new lease or the close of escrow. It claims that its

¹ We will separately address the trial court's ruling on the alleged Cartwright Act violation because it concerns a different business and arises from events that occurred after Dennell's death. Century 21 withdrew its Unruh Act claim at a hearing on a motion for judgment. (Code Civ. Proc., § 631.8.)

right to a commission "became fixed" when Dennell and Hamer agreed to the conditional offer. This is incorrect.

The lease contingency was a condition precedent to Maida's performance. "A condition is an event, not certain to occur, which must occur, unless nonoccurrence is excused, before performance under a contract becomes due. [Rest.2d Contracts §§ 224, 225]." (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2009) ¶ 4:388; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 776, p. 866.) Maida's offer was contingent upon an event that did not occur. The sellers and Maida executed instructions to cancel escrow. The subsequent letters from Maida's counsel attempting to resurrect the transaction were not sufficient to remove the condition or modify the contract. Century 21's assertions are without merit.

Century 21 next contends that Dennell and Hamer's agreements to extend escrow, coupled with Maida's alleged financial ability to purchase both properties, is sufficient to show that it is entitled to compensation. Century 21 points to Maida's trial testimony that, even after cancelling escrow, he was prepared to waive the lease contingency and proceed with purchase of the store based solely on an assignment of the existing lease. Maida's trial testimony does not overcome the written terms to which he agreed in the BPA.

At oral argument, Century 21 argued that a broker is entitled to a commission when he enters into a binding contract for the sale of property, whether or not the sale is consummated. In support, it cited extensively to *RC Royal Development and Realty Corp. v. Standard Pacific Corp. (RC)* (2009) 177 Cal.App.4th 1410; *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299; and this court's decision in *Century 21 Butler Realty, Inc. v. Vasquez* (1995) 41 Cal.App.4th 888.)

RC bears little resemblance to the facts before us. *RC*, a broker, represented the buyer in the purchase of land for the development of over 200 condominiums. Although the transaction was never completed, the buyer partially

performed the contract, giving it a "beneficial interest" in the property. This entitled *RC* to a commission.

In reaching this conclusion, the reviewing court considered that the buyer had (1) paid several million dollars in earnest money and other fees; (2) waived its right to terminate the brokerage agreement by failing to terminate during a specified review period; and (3) entered into purchase contracts with prospective buyers of condominium units. As such, the buyer had partially performed its contractual obligations. Once it entered into the contract with seller, the buyer obtained equitable title, giving it a "beneficial interest" in the property. *RC* had therefore earned its commission. (*RC*, *supra*, 177 Cal.App.4th at p. 1419-1420.) Unlike the buyer in *RC*, there was no partial performance by Maida. No factors exist in our case that gave Maida a "beneficial interest" in the Santa Ynez store.

In *Steve Schmidt & Co. v. Berry*, *supra*, 183 Cal.App.3d at p. 1307, the court determined that a purchaser is an "able" buyer when he has both the legal and financial capacity to purchase the property. Century 21 makes much of this statement to argue that Maida was a ready willing and able buyer because he testified at trial that he had the financial resources to purchase the store. Maida's financial solvency was not in dispute, thus Century 21's reliance on *Schmidt & Co.* is unavailing.

In *Century 21 Butler Realty, Inc. v. Vasquez*, *supra*, 41 Cal.App.4th at p. 892, we held that an exclusive listing agreement is binding until its date of expiration. A broker is entitled to a commission if the property is sold by any means prior to expiration of the listing term. A seller who refuses to pay a commission for property sold during this time is in breach of the listing agreement. (*Ibid.*) Dennell and Hamer's listing agreement with Century 21 expired on July 1, 2007, without Century 21 having produced a buyer who had the ability to purchase the business. Century 21 succeeded only in presenting Dennell and Hamer with a conditional offer. There was no sale. Century 21 has done nothing to earn a commission.

Personal Liability of Dennell and Hamer

Century 21 claims that Dennell and Hamer were personally liable for payment of the lease commission because they signed their names to the exclusive listing agreement and the BPA without making reference to an LLC. We need not reach this issue. The trial court found that Century 21 was not entitled to a commission because Maida had not satisfied or removed the lease contingency. It is unnecessary to address the manner in which the documents were executed.

Sale of Los Olivos Store - Alleged Cartwright Act Violation

Century 21's alleged Cartwright Act violation arose from the twin sales of the Santa Ynez store and the R Country Store in Los Olivos (Los Olivos Store). Both businesses were sold after Dennell's death. Dennell had been the sole owner of the Los Olivos store, which was more profitable than the Santa Ynez store. Maida's objective had been to purchase only the Los Olivos store. Dennell, however, was unwilling to sell it without also selling the Santa Ynez store.

Before Dennell's death, he and Hamer granted Maida an 18-month option to purchase the Los Olivos store for \$950,000 plus inventory, following the sale of the Santa Ynez store. Robert Joyce of Century 21 prepared an addendum to the BPA memorializing the option. He also prepared another agreement in which Dennell agreed to pay a five-percent commission if Maida purchased both stores.

After Dennell's death, real estate broker Mike Brady was retained to sell the Los Olivos store. Brady sought bidders, and conveyed ten offers to Diane Dennell, including one by Maida through Century 21. Brady and Diane Dennell selected one prospective buyer with whom to negotiate, which was not Maida. The estate ultimately sold the stores to different buyers. Hamer's brother-in-law bought the Santa Ynez store.

Century 21 alleged that the bidders brought by Century 21 were systematically excluded from the estate's bidding process. It claimed that respondents did not act in good faith and engaged in unfair competition by preventing Maida and others from buying both stores. Their conduct allegedly violated the Cartwright Act, which

prohibits agreements in restraint of trade. (Bus. & Prof., § 16720 et seq.) A violation requires that two or more people engage in activity to restrict trade, increase the price of a commodity, or prevent competition for its sale. (*Id.*, § 16720, subds. (a)-(e).)

In its oral pronouncement, the trial court noted that the evidence regarding the bidding process showed only that offers were being accepted, which were narrowed down to a single offer. The court stated that the estate's decision not to select a certain offer did not constitute a violation of the Cartwright Act, and that respondents had not submitted evidence of an act in restraint of trade. We agree. Appellant has not succeeded in proving a Cartwright Act violation.

Statement of Decision

Following trial, counsel for Century 21 requested a statement of decision and the court ordered him to submit the issues he wished addressed. Counsel submitted 36 issues, together with 35 answers, incorporated into an unsolicited proposed statement of decision. The trial court then issued its own statement of decision. Century 21 attacks the trial court's statement as incomplete and inadequate to support its ruling.

"[A] statement of decision is adequate if it fairly discloses the determinations as to the ultimate facts and material issues in the case." (*Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 513.) It need not discuss each question listed by a party; it only need explain the factual and legal basis of its decision regarding the principal controverted issues. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1530-1531.)

The trial court detailed the numerous transactions and communications involving the sales of both stores. It addressed Century 21's causes of action for breach of contract and the alleged Cartwright Act violation. The court explained in detail its rationale for determining that Maida's failure to satisfy or remove the lease contingency from the BPA caused the transaction to fail; and that there was no evidence of improper conduct by respondents, or of an agreement in restraint of trade.

Substantial evidence supports the trial court's findings that Maida failed to satisfy the lease contingency in the BPA for the Santa Ynez store; that Century 21 is not entitled to a commission as described in the listing agreement; and respondents did nothing to interfere with the sale of either the Santa Ynez or Los Olivos store.

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

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